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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

November 27, 2000

Ex Parte

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th St., S.W.
Washington, D.C. 20554

Re: CC Docket No. 96-128 — remand of inmate telephone service issues

Dear Ms. Salas:

I am writing on behalf of the RBOC Payphone Coalition in response to the *ex parte* submission of the Inmate Calling Service Providers Coalition ("ICSPC"), dated September 12, 2000. In that document, the ICSPC attempts to provide justification for treating operator services provided to inmate payphones differently from operator services provided to other public payphones for purposes of implementation of section 276.

ICSPC's latest effort contains little that is new — the bulk of the document repeats the same unsubstantiated accusations of discrimination or subsidization that the RBOC Coalition laid to rest in its own *ex parte* presentation, filed June 7, 2000. The simple fact is that all services that LECs provide to their own inmate payphone operations are available to independent providers on the same terms and conditions; there can be no discrimination or subsidy, and the ICSPC has no evidence to the contrary.

Deprived of factual support, the ICSPC concocts an argument to support the claim that, as a matter of law, the Commission has no choice but to require incumbent LECs to create structurally separate operator services operations solely to cater to their inmate payphones. ICSPC's new-found legal arguments have no merit.

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First, the ICSPC's claim that operator services provided to inmate payphones do not qualify as operator services for purposes of the rules adopted in the Commission's *Payphone Orders* is flatly wrong. In fact, the FCC has already held precisely to the contrary: where ILECs provide collect calling to their inmate payphones, that service does constitute operator services within the meaning of the 1996 Act for purposes of implementation of section 276. See Memorandum Opinion and Order, *Local Exchange Carriers Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs*, 14 FCC Rcd 16784, 16791, ¶ 11 & n.38 (1999). Indeed, as the RBOC Coalition has already pointed out, this treatment of costs and revenues is precisely the same as for collect calls made from LEC-affiliated public payphones. See Report and Order, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 20541, 20622, ¶ 159 (1996); Memorandum Opinion and Order, *Local Exchange Carriers Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs*, 12 FCC Rcd 15145, 15153-54, ¶ 20 (1997).

The Commission did not err in drawing the same line between operator services and payphone services in the public payphone context and the inmate payphone context; indeed, such treatment is fairly compelled by the language of the 1996 Act. Section 276(d) provides that "[a]s used in [section 276], the term 'payphone service' means the provision of public or semi-public pay telephones, the provision of inmate telephone service in correctional institutions, and any ancillary services." 47 U.S.C. § 276(d). Accordingly, if operator services are not included within the definition of "payphone service" for purposes of section 276(b)(1)(C) in the case of public payphones, it cannot be included in that definition in the case of inmate telephone service either. The Commission is *not* at liberty to fashion a separate set of rules that would distinguish between public payphones and inmate payphones for purposes of implementation of section 276.

The ICSPC claims that, as a matter of law, collect calling service provided to inmate payphones does not constitute "operator services" for purposes of section 226(a)(7), but this argument is simply irrelevant to the issue at hand. In Report and Order, *Policies and Rules Concerning Operator Service Providers*, 6 FCC Rcd 2744 (1991) ("*OSP Order*"), the Commission imposed a series of "specific rules aimed at solving problems in the operator services industry," including "unreasonably high rates and anticompetitive practices." *Id.* at 2746, ¶¶ 2, 3 (citation omitted). The Commission determined that restrictions placed on aggregators would not apply to inmate payphone providers, because "provision of such phones to inmates presents an exceptional set of circumstances." *Id.* at 2752, ¶ 15. Accordingly, operator services provided to those inmate payphones were not considered "operator services" for purposes of those rules. *Id.* at 2752 n.30. That determination, however, had nothing to do with the issue here, which is whether operator services are *included within* the definition of inmate payphone service. Indeed, the rest of the Commission's discussion in that earlier order — which draws a clear boundary between the provider of the inmate-only phone and the "carrier providing service to inmate-only payphones" (*id.*) — actually proves the RBOC Payphone Coalition's point. That order makes

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clear that the provision of inmate payphones is distinct from the provision of operator services (or any other carrier services) to users of those inmate payphones.

Second, the ICSPC's argument that distinctions between inmate payphones and public payphones compel differential treatment of those payphones for purposes of implementation of section 276 — in addition to being contrary to the statutory language — has no basis in fact or logic. The ICSPC claims that because the “only inmate service offered in most facilities is collect calling service, if that service is not included in ‘inmate telephone service,’ then the term ‘inmate telephone service’ has no meaning in Section 276.” ICSPC *ex parte* at 4. This is plainly incorrect. It is always true — for both inmate payphone service and for public payphone service — that merely providing access to payphone equipment would be useless unless the payphone service provider also made available telecommunications services and operator services that permitted the end-users to complete local and long-distance telephone calls. Yet section 276 obviously does not require LECs to deregulate the portion of their networks that are devoted to providing service to public payphones. Rather, under the *Payphone Orders*, section 276 requires LEC-affiliated PSPs to treat payphone equipment as deregulated CPE, to file CEI plans (in the case of the RBOCs), and to provide service on a nondiscriminatory basis to affiliated and unaffiliated PSPs alike. The situation is precisely the same in the case of inmate payphones.

In other words, the service encompassed within the meaning of “inmate telephone service” — as with the term “payphone service” — is the provision of CPE that permits payphone users to gain access to various telecommunications services that may, or may not, be provided by an affiliated telecommunications service provider. Accordingly, it is the ICSPC's interpretation of the statute — which would read section 276(d) out of the 1996 Act — not the Commission's reading, that is “contrary to the plain meaning of the Act.” Again, the very authorities upon which the ICSPC purports to rely emphasize the distinction between provision of inmate payphones and the provision of operator services from those payphones. *OSP Order*, 6 FCC Rcd at 2752.

The ICSPC also argues that the result it seeks is supported by the fact that collect calling service from inmate payphones may be provided in part using equipment that is located on site. But the FCC has reasonably determined that the type of equipment used to provide the operator service should not make a difference — indeed, any other approach would risk producing the type of arbitrary regulatory differentiation among providers that section 276 was intended to eliminate. The costs of the equipment can easily be divided among regulated and non-regulated accounts, contrary to the ICSPC's claim.

In sum, section 276 plainly permits — indeed, compels — the Commission to draw the line between non-regulated CPE and regulated services in the same fashion for public payphones and inmate payphones, and the ICSPC's contrary claim ignores the plain terms of the statute. As for ICSPC's continued accusations of subsidy or discrimination, those accusations are both

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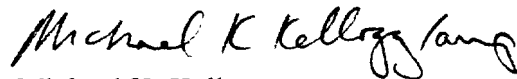
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incorrect and wholly unsubstantiated. Indeed, as the RBOC Coalition has pointed out, LEC-affiliated inmate payphone service providers employ a variety of business arrangements to provide payphone service; it is far from true that all use LEC operator services. June 7, 2000 *ex parte* at 3 n.4. The ICSPC studiously ignores this point in its voluminous response, because to acknowledge it is to recognize that the supposed advantages enjoyed by ILEC-affiliated inmate payphone providers simply do not exist.

In accordance with section 1.1206(b)(1) of the Commission's rules, I have enclosed two copies of this letter. Please include it in the record in this proceeding.

Sincerely,

A handwritten signature in black ink that reads "Michael K Kellogg" with a stylized flourish at the end.

Michael K. Kellogg

cc: Tamara Preiss
Jay Atkinson